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cc: <Horst_Greczmiel@ceq.eop.gov>, "KEN BOGDAN" <KBogdan@jsanet.com>, "Ron Bass" <rtbass@mind.net>
Subject: NEPA Task Force Response to Request for Comments

NEPA Task Force
P.O. Box 221150
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Dear Task Force Members:

We are pleased to submit comments to the task force concerning the implementation of NEPA. Our firm, Jones & Stokes, has been involved in NEPA compliance for more than 30 years throughout the western United States. We have particularly strong NEPA experience in California and Washington, both of which have state-level environmental impact assessment laws. Thus, we also have considerable experience in preparing joint federal-state documents. We have worked with a broad variety of federal agencies and have prepared dozens of environmental impact statements (EISs) and hundreds of environmental assessments (EA). Additionally, each year, we teach numerous courses on environmental impact assessment. Ken Bogdan and I are also the co-authors of The NEPA Book: A Step-by-Step Guide on How to Comply with the National Environmental Policy Act, published by Solano Press Books. Rather than elaborate on our experience, we refer you to our web site at: http://www.jonesandstokes.com.

NEPA is clearly the backbone of the federal system of environmental protection. The environmental review process established by NEPA has become the standard by which most federal government agencies plan and make decisions. Some of the concepts that were first introduced by NEPA (e.g., scoping, interdisplinary analysis of impacts, consideration of alternatives and mitigation measures, soliciting and responding to comments, explaining decisions) are now widely implemented by all government agencies and well-accepted by the public.

Over the past 30 years, NEPA practice has evolved considerably. While the EIS was formerly considered the "heart" of NEPA, today the EA/FONSI is the predominant document that federal agencies prepare to satisfy the law's requirements. More than 50,000 EA/FONSIs are prepared annually, compared to about 500 EISs. Despite this fundamental shift in NEPA implementation, neither the CEQ NEPA regulations nor the typical federal agency NEPA guidance have kept pace with the emphasis on the EA/FONSI.

In view of this background, we would like to offer suggestions specifically focused on two areas of NEPA practice: Programmatic EISs and EAs.

Programmatic Documents

Jones & Stokes has been involved in some of the largest, most complex types of programmatic NEPA documents in the western U.S. We believe strongly in the value of these types of documents for several reasons. First, programmatic NEPA documents provide the framework for integrating environmental considerations into the planning process for large, controversial plans and programs. Second, the application of NEPA plans and programs provides agencies with a familiar procedural process and familiar disclosure documents-despite the unusual complexity of the underlying activities. Third, the NEPA process encourages collaboration among stakeholders in situations where there are often multiple parties with very divergent points of view.

One example is the joint environmental impact statement/environmental impact report prepared for the CALFED Bay-Delta Program. This joint effort was undertaken by multiple state and federal agencies involved in water management in the Sacramento-San Joaquin Delta in central California. This joint effort is unprecedented in the realm of government cooperation, and one of the key elements of the project was the preparation of a joint Environmental Impact Statement/Environmental Impact Report (under CEQA). NEPA provided an important part of the legal and scientific framework under which this program is being implemented. The NEPA/CEQA environmental study was responsible for the nature, extent, and scope of many of the environmental studies and was instrumental in the high level of inter-governmental coordination and public involvement. Additionally, the EIS/EIR will provide a valuable basis for tiering future federal and state environmental documents. Information about the CALFED program is available at: http://www.calfed.water.ca.gov/.

As the CALFED program illustrates, NEPA appears to work best in states with their own environmental impact assessment laws. The similarity between NEPA and CEQA means that state and local agencies are already familiar with general concepts of environmental impact assessment and are, therefore, more willing to cooperate in joint planning efforts.

Recommendations

Based on our experiences with CALFED and other programmatic documents, we feel the Task Force should provide additional guidance and encouragement to agencies to prepare environmental impact statements on broad-scale plans and programs. Additionally, the Task Force should

encourage other states to adopt "little NEPA"-type laws to provide the common framework to make NEPA more successful throughout the nation.

Environmental Assessments and Findings of No Significant Impact

Although there are many examples of successful EAs/FONSIs, we have identified 12 common problems with EA/FONSI practice and offer recommendations to improve each. While not all projects experience all of these problems, they are all too common throughout the federal government.

1. Pre-determining that an EIS will not be necessary, then trying to justify such conclusion after-the-fact

Summary of the problem—Too many times, agency staff will decide, before preparing an EA, that they do not plan to prepare and EIS. Perhaps the primary reason this occurs is that most agencies have created such a complex, internal process for preparing an EIS that they want to avoid going through it. Stated differently, the procedural difference between an EIS and an EA/FONSI is often so great that the EA/FONSI becomes an attractive option, regardless of the level of impact that might occur from a proposed action. When this happens, data and analysis in the EA is often manipulated to justify the conclusion that there are no significant effects, despite the facts that such effects would, indeed, occur. This is one of the most difficult problems to fix because it often requires changes to the internal EIS preparation and review process as well as changes in staff attitudes toward EIS preparation.

Recommended solution—To the extent that CEQ focuses its efforts on "streamlining" NEPA, it should focus on the internal aspects of the EIS process (e.g., intra-agency reviews), rather than making changes to the required steps in the external review process or to the content requirements of NEPA documents. By reducing the internal procedural differences between an EIS and an EA, agencies may be more likely to prepare the legally correct document, rather pursue the path of least resistance.

2. Conclusions in FONSI not supported by the evidence in the EA

Summary of problem—In too many EA/FONSI situations, the agency's conclusions as to the non-significance of impacts are not supported by the evidence (e.g., data, studies, analysis) in the EA.

Recommended solution—Provide clear guidance on the nature and extent of analytical information that is necessary to support FONSI. Provide good examples of the link between an EA and a FONSI.

3. Failure of agencies to clearly identify the "significance" level of environmental effects in an EA

Summary of problem—According to Sec. 1508.9 of the CEQ NEPA regulations, the primary purpose of an EA is to provide sufficient evidence and analysis for determining whether to prepare an EIS or a FONSI. The triggering threshold for preparing an EIS is whether the proposed action would "significantly affect the quality of the human environment." Given the importance of this phrase, one would expect an EA to clearly spell out, for each affected resource, whether or not the environmental effect exceeds or does not exceed the threshold for being considered "significant." Yet, in practice this is rarely done-leaving the reader of the EA to wonder what factors the agency used in arriving at its conclusions. Some agencies completely avoid using the word "significant" in their environmental assessments, instead using a broad variety of confusing terminology.

Recommended solution—Require each federal agency, as a part of its NEPA procedures, to establish "thresholds of significance" for each environmental resource. With such established thresholds, the public and decision-makers will know precisely what criteria an agency used to determine whether or not an environmental effect "significantly affected the quality of the human environment" and will create a more disciplined approach to EA/FONSI practice. By relying on "thresholds of significance," agencies are less likely to act arbitrarily in concluding that impacts are, or are not, "significant."

The Guidelines implementing CEQA encourages agencies to adopt thresholds of significance. (14 Cal. Code Reg. 15064.7) Those agencies that have done so typically use the thresholds as "presumptions" of significance, but can still introduce project-specific data to rebut the presumption. This would appear to be a good approach to apply to the NEPA process. Information about CEQA, including the above Guidelines section, may be found at http://ceres.ca.gov/ceqa/.

4. "Non-Significance" of impacts improperly justified

Summary of problem—Too many agencies do not rely on the "context" and "intensity" factors when determining that impacts are "less-than-significant." Because context and intensity form the definition of "significantly" under Section 1508.27 of the CEQ NEPA regulations, it is critical that agencies use these factors to explain why an impact is not significant..

Recommended solution—Develop a recommended "context" and "intensity" worksheet or checklist for each potential environmental effect

that agencies must complete to document why an impact is not significant. Require that the checklist be supported by data and explanations, which will form the evidentiary support for the conclusions. The use of such a check list will provide greater assurance that the context and intensity factors will be used and explained in the EA, and will foster greater uniformity from agency to agency and from project to project. Such an approach is used under the states' little NEPA laws in both California and Washington.

5. Insufficient scoping for Environmental Assessments

Summary of problem—Due to the lack of CEQ guidance regarding scoping for Environmental Assessments, agency practice varies widely. In some cases, no scoping occurs when an EA is prepared, whereas in other cases, scoping similar to that for an EIA occurs. When inadequate scoping occurs, other agencies and the public are limited in their ability to influence the scope and content of an EA. One apparent reason for the lack of scoping in the EA process is that the scoping section of the CEQ regulations (Sec. 1501.7) only refers to scoping during EIS preparation.

Recommended solution—Provide required minimum scoping efforts that must be achieved for EA preparation for different types of proposals. Update the CEQ "Scoping Guidance" to emphasize the use of scoping for the preparation of an EA and to reflect current technology and methods.

6. Insufficient and inconsistent public notice and review of environmental assessments

Summary of problem—As with the issue of "scoping," there is currently no established minimum for what constitutes adequate public notice and availability of an EA. The practice varies widely, and some documents received either very ineffective notice, or no notice at all. Thus, the public often has very limited their opportunities to learn about proposed federal actions, and to provide their views.

Recommended solution—Provide a required minimum public notice and review requirement for environmental assessments. Provide for notification in newspapers of general circulation, as well as guidance to the use of the internet.

7. Improperly "segmenting" certain types of proposed actions to avoid or minimize NEPA review and evaluation

Summary of problem—In some situations, federal agencies will describe and evaluate a portion of a proposed action without considering "connected" or "related" actions in the same document as required by the CEQ NEPA regulations. One of the most glaring examples was the situation that gave rise to the decision in 753 F 2d 754 (9th Cir. 1985). In that case, the lead agency evaluated the impacts of a forest road without considering the timber sale for which the road was being constructed. This problem has arisen in other, more recent cases.

Recommended solution—Provide clear and specific advice as to when "connected" and "related" actions must be considering the NEPA documents, specifically in the preparation of Environmental Assessments. Also provide advice as to when actions need not be considered "related" or "connected."

8. Lack of clarity over when alternatives must be evaluated in an environmental assessment

Summary of problem—Under the current CEQ Regulations, there is great uncertainty as to whether alternatives are or are not required in an EA, and when they are-the degree to which they must be evaluated. The problem stems for the somewhat cryptic reference found in section 1508.9, which states that an EA must discuss alternatives "as required by section 102(2)(E) ...." Section 102(2)(E) of NEPA provides "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternatives uses of available resources." Unfortunately, in more than 30 years of NEPA guidance and practice, nobody has provided a clear explanation of what that section means for EA practice.

Recommended solution—Provide clear and specific advice as to when and how alternatives must be evaluated in the context of an EA and the level of detail by which those alternatives must be studies for the EA to be considered adequate.

9. Inadequate evaluation of cumulative impacts in environmental assessments

Summary of problem—As evidenced by three recent NEPA court decisions [*Native Ecosystems Council v. Dombeck* (9th Cir. Sept 16, 2002); *Kern v. BLM 284 F. 3d 1075* (9th Cir. 2001); *Hall v. Norton* 266 F. 3d 969 (9th Cir. 2001)] there is considerable misunderstanding as to when and how cumulative impacts must be evaluated in an EA. Despite CEQ's recent study, Considering Cumulative Impacts under the National Environmental Policy Act, many agencies and their NEPA specialists are not considering cumulative impacts in environmental assessments, and if they are, the analysis is often inadequate.

Recommended solution—Provide clear and specific advice as to when and how cumulative impacts must be evaluated in an EA. Additionally, explain how an agency can justify preparing a FONSI for an individual proposal, when that proposal contributes to an effect that is already cumulatively significant.

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10. Inadequate mitigation measures to support Findings of No Significant Impact

Summary of problem—One of the most widespread and pervasive problems with environmental assessments is the failure of agencies to prepare adequate mitigation measures. Many mitigation measures do not fit into the categories defined in section 1508.20 of the CEQ NEPA regulations (i.e., "avoid," "minimize," "rectify," "reduce over time," or "compensate"). Rather, too many agencies rely on ambiguous concepts (e.g., "encourage") or deferred mitigation (e.g., "study further") that do not assure that environmental problems are solved. This is especially problematic in the case of a FONSI, where the agency must demonstrate that it has, indeed, mitigated away any potentially significant effects.

Recommended solution—Provide further guidance and examples of what constitutes adequate and inadequate mitigation. A good starting place would be the numerous court decisions, dealing with EA/FONSIs, where the courts have enumerated what is, and what is not, adequate. CEQ should publish a mitigation guidance document that spells out such examples.

11. Failure to integrate other laws into the NEPA document

Summary of problem—The requirement to integrate NEPA with other laws and regulations is misunderstood and poorly implemented by many agencies. One reason for this problem is that the relevant section of the CEQ NEPA regulations (1502.25) only refers to EIS preparation when, in practice, integration should occur for all proposed actions. Thus, the concept of integration either gets overlooked during EA preparation or not addressed until the NEPA process is almost completed. Such failure to coordinate and integrate early in the process inevitably leads to duplication and delay.

Recommended solution—Provide clear guidance that the integration requirements of NEPA apply to EA preparation, not just EIS preparation. Provide a more complete list of laws and regulations that must be integrated with NEPA and provide specific suggestions as to when and how to achieve successful integration with other laws.

12. Lack of consistency in decision documents

Summary of problem—Some agencies prepare decision documents (e.g., Record of Decision) and others do not, when they prepare an EA/FONSI. There is no consistency in this area of NEPA practice. One reason for this problem is that the CEQ regulations do not address the preparation of a decision document for an EA/FONSI.

Recommended solution—Provide for a consistent type of document and specify the contents of that document when an EA/FONSI is prepared.

We are aware of the administration's current efforts to "streamline" NEPA, and urge the Task Force not to lose sight of the need to strengthen those areas of NEPA practice that are in need of improvement.

We are glad that the Task Force is making an effort to improve NEPA practice and appreciate the opportunity to participate in your effort. If you have any questions about our suggestions, please let us know.

Sincerely,

Ron Bass, Principal, Jones & Stokes
and
Ken Bogdan, Environmental Counsel, Jones & Stokes